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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. SAMUEL MENDEZ, Defendant and Appellant.	G056156 (Super. Ct. No. 16NF3372) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gary S. Paer, Judge. Affirmed.

Gerald J. Miller, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Michael Pulos and Seth M. Friedman, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted Samuel Mendez of various crimes arising from three incidents of domestic violence against his girlfriend, B.P. Mendez contends the trial court abused its discretion by denying his motion to sever charges and by admitting evidence of uncharged acts of domestic violence. He further argues the cumulative effect of these alleged errors requires reversal of his convictions. We disagree and affirm the judgment.

I.

FACTS[1]

Mendez and B.P. started dating in 2014. During their three-year relationship, they frequently argued, sometimes in public. Most of their arguments related to Mendez's infidelity.

Mendez became verbally abusive toward B.P. in late 2014. The abuse escalated to violence in early March 2015, when Mendez punched B.P. during a dispute over money, leaving her with a cut lip and bruised chest. The trial court permitted B.P. to testify about the early March 2015 incident, although the prosecution did not charge Mendez for this act. Instead, the charges at issue here arose out of three incidents of domestic violence that occurred in the subsequent 21-month period.

First, in late March 2015, during an argument in B.P.'s apartment about cheating, Mendez slapped B.P.'s face, told her to shut up, pushed her onto a bed, hit her in the ribs, and bit her arm.

Second, in late November 2016, Mendez and B.P. got into an argument at a local grocery store after Mendez accused B.P. of flirting with the store's security guard. Mendez called B.P. a whore and returned to the car. B.P. trailed Mendez to the parking lot and tried to speak to him through the car window. Mendez backed the car up, forcing

[1] Our description of the facts comes primarily, but not entirely, from B.P.'s trial testimony. We also draw facts from the testimony of police officers and B.P.'s family members, whose testimony was at times inconsistent with B.P.'s trial testimony.

B.P. to move out of the way, and drove off. B.P. reentered the store. About five minutes later, Mendez returned, still angry. He put his arm around B.P., accused her of cheating, called her a slut, and led her to the car. Once in the car, Mendez pulled B.P.'s hair and punched her repeatedly on her body and head, causing bruises. Mendez told B.P. to shut up when she started to cry. Mendez drove them to his sisters' house in Los Angeles so he could talk to his sisters about what he had done. Once there B.P. and Mendez continued to argue, and at one point Mendez threw the car keys at B.P.'s back so hard they left a mark. B.P. returned the keys to Mendez, and he drove her home to their apartment.

Third, just a few days later in early December 2016, Mendez visited B.P. at her restaurant job in the evening as she was returning from her 30-minute break, and he accused her of being with another man. Mendez then told B.P. to go look at the car, and he put his arm across her shoulder, led her outside, and told her to get in the backseat. B.P. was afraid Mendez was going to hit her, and she did not want to get in the car. Mendez grabbed her arm, pushed her inside the car and onto the backseat, and then drove her around for several hours as he yelled at her and accused her of cheating. He made B.P. call her boss to say she was not going to work that night. Eventually, the car ran out of gas, so they parked in a parking lot and fell asleep, where the police, who had been alerted to a possible kidnapping, later found them.

Mendez was charged with a total of eight counts for those three incidents as follows: for the late March 2015 incident, he was charged with domestic battery with corporal injury (Pen. Code, § 273.5, subd. (a); all further undesignated statutory references are to this code) (domestic battery) (count 7) and assault with force likely to produce great bodily injury (§ 245, subd. (a)(4)) (assault) (count 8); for the November 2016 incident, he was charged with simple kidnapping (§ 207, subd. (a)) (kidnapping) (count 3), domestic battery (count 4), assault (count 5), and assault with a deadly weapon

(§ 245, subd. (a)(1)) (count 6)[2]; and for the December 2016 incident, he was charged with kidnapping (count 1) and domestic battery (count 2). He was also charged with a "strike" prior (§ 667, subds. (d), (e)(1)), a serious-felony prior (§ 667, subd. (a)(1)), and a prison prior (§ 667.5, subd. (a)).

Before trial, Mendez moved to sever the eight counts by their respective dates. The trial court denied his motion, explaining the counts "were all the same class of crimes [involving] domestic violence [and] assaultive type behavior" and thus shared "common characteristics"; there was "no doubt" "the charges are cross-admissible"; the charges all involved "the same victim . . . and the same defendant" "; and there was no "substantial danger of prejudice that would require these to be tried separately. We are not talking about any big time injuries on any of these."

After both sides rested, Mendez moved to dismiss counts 1, 2, 3, 5, 6, and 8 on the grounds there was insufficient evidence to sustain a conviction on those charges. (§ 1118.1.) The trial court granted Mendez's motion on counts 2, 5, 6, and 8.

The jury convicted Mendez on the four remaining counts, finding him guilty of domestic battery for the late March 2015 incident (count 7), domestic battery and kidnapping for the November 2016 incident (counts 3 & 4), and kidnapping for the December 2016 incident (count 1). Mendez admitted the strike prior, the serious-felony prior, and the prison prior. The trial court struck the strike prior and prison prior and sentenced Mendez to a total term of 12 years and eight months on counts 1, 3, 4, and 7 and the serious-felony prior. Mendez timely appealed.

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[2] Although B.P. initially told the police Mendez had tried to run her over with the car during the November 2016 incident, she later testified that was an exaggeration. Mendez's alleged attempt to hit B.P. with the car was the basis for counts 5 and 6, which the prosecutor later conceded should be dismissed for lack of substantial evidence.

II.

DISCUSSION

A. *The Trial Court Did Not Abuse Its Discretion by Denying Mendez's Motion to Sever*

Mendez first contends the trial court abused its discretion by denying his severance motion. He asserts joinder of the counts was improper, prejudicial, and resulted in a denial of due process. None of his contentions have merit.

1. Standard of Review

Section 954 allows the prosecution to charge "two or more different offenses connected together in their commission, . . . or two or more different offenses of the same class of crimes or offenses" in the same accusatory pleading. (§ 954.) This "'permits the joinder of different offenses, even though they do not relate to the same transaction or event, if there is a common element of substantial importance in their commission.'" (*People v. Armstrong* (2016) 1 Cal.5th 432, 455 (*Armstrong*).) Section 954 adds, however, that "in the interests of justice and for good cause shown," the trial court "may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately." (§ 954.)

Whether the prosecution properly joined charges under section 954 "is a question of law and is subject to independent review on appeal." (*People v. Cunningham* (2001) 25 Cal.4th 926, 984.) If the charges were properly joined, we review the trial court's denial of a motion to sever for abuse of discretion (*ibid.*), evaluating the court's ruling "in light of the showings made and the facts known by the trial court at the time of the court's ruling." (*People v. Merriman* (2014) 60 Cal.4th 1, 37.) "Where . . . the statutory requirements for joinder are met, a defendant must make a 'clear showing of prejudice' to establish that the trial court abused its discretion in denying the motion" (*People v. Simon* (2016) 1 Cal.5th 98, 122-123, fn. omitted (*Simon*)) and show the ruling

fell outside the bounds of reason (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1220 (*Alcala*)). Further, "'even if a trial court's ruling on a motion to sever is correct at the time it was made, [we] still must determine whether, in the end, the joinder of counts . . . for trial resulted in gross unfairness depriving the defendant of due process of law.'" (*People v. Soper* (2009) 45 Cal.4th 759, 783 (*Soper*).)

2. Joinder Was Proper Under Section 954

Mendez first contends severance was required because the offenses in question were neither "'connected together in their commission'" nor "'of the same class of crimes or offenses'" under section 954. We disagree.

Crimes are "'connected together in their commission'" if there is a "'common element of substantial importance in their commission.'" (*Alcala*, *supra*, 43 Cal.4th at p. 1219.) This requirement may be met even though the charged offenses ""'do not relate to the same transaction and were committed at different times and places.'"" (*Id*. at p. 1218, ital. omitted.)

"Offenses are of the same class when they possess common attributes," such as "when they all involve assaultive crimes against the person." (*People v. Leney* (1989) 213 Cal.App.3d 265, 269.) For example, murder, robbery, and rape are "'of the same class of crimes'" or offenses under section 954. (*Simon, supra,* 1 Cal.5th at p. 122, fn. 9.) By comparison, possession of drug paraphernalia shares no common characteristics or attributes with the crime of failure to appear and therefore does not belong to the "'same class of crimes.'" (*People v. Madden* (1988) 206 Cal.App.3d Supp. 14, 18.)

Mendez argues joinder was inappropriate because the charges arose out of three separate incidents that occurred at three different locations over the course of nearly two years and thus are "logically unrelated." Not so. All the charges arose from acts of domestic violence by the same defendant against the same victim arising in the same context: arguments over cheating. Those common threads are sufficient to connect the

crimes in their commission. (See *People v. Landry* (2016) 2 Cal.5th 52, 76 [offenses were connected together in their commission where there was a "common thread" linking them]; see also *People v. Anderson* (2018) 5 Cal.5th 372, 388 [joinder proper where crimes "'all involved the intent to illegally obtain property'"].) Further, each incident involved assaultive crimes against the person, and thus involved charges of the same class of crimes or offenses. Although the acts of domestic violence occurred over a 20-month span, the length of time between the incidents is not dispositive. (See, e.g., *People v. Catlin* (2001) 26 Cal.4th 81, 99, 101, 110-113 [joinder proper even though two murders occurred eight years apart].) The prosecution therefore properly joined the charges under section 954.

3. The Trial Court Did Not Abuse Its Discretion in Denying the Severance Motion

Mendez next contends the trial court abused its discretion in refusing to sever the various counts and incidents for good cause and in the interests of justice under section 954. When, as here, charges were "properly joined . . . , a defendant must make a 'clear showing of prejudice' in order to establish that a trial court's denial of a motion for severance was an abuse of discretion." (*People v. Jackson* (2016) 1 Cal.5th 269, 299.) Mendez has not made that showing.

"In determining whether a trial court abused its discretion under section 954 in declining to sever properly joined charges," we first "consider the cross-admissibility of the evidence in hypothetical separate trials." (*Soper, supra,* 45 Cal.4th at p. 774.) "If the evidence underlying the charges in question would be cross-admissible, that factor alone is normally sufficient to dispel any suggestion of prejudice and to justify a trial court's refusal to sever properly joined charges." (*Id.* at pp. 774-775.)

Here, evidence of each incident would have been admissible in separate trials on the other two incidents. (See Evid. Code, § 1109, subd. (a)(1) [propensity

evidence of defendant's commission of other acts of domestic violence admissible unless it is unduly prejudicial under Evid. Code, § 352]; see also discussion in Section II.B, *infra*.) For that reason alone, the trial court did not abuse its discretion when it denied Mendez's severance motion.

Even if the underlying charges were not cross-admissible, however, our conclusion would be the same. When charges are not cross-admissible, courts next consider "'whether the benefits of joinder were sufficiently substantial to outweigh the possible "spill-over" effect of the "other-crimes" evidence on the jury in its consideration of the evidence of defendant's guilt of each set of offenses.'" (*Soper, supra,* 45 Cal.4th at p. 775.) "In making *that* assessment, we consider three additional factors, any of which—combined with our earlier determination of absence of cross-admissibility—might establish an abuse of the trial court's discretion: (1) whether some of the charges are particularly likely to inflame the jury against the defendant; (2) whether a weak case has been joined with a strong case or another weak case so that the totality of the evidence may alter the outcome as to some or all of the charges; or (3) whether one of the charges (but not another) is a capital offense, or the joinder of the charges converts the matter into a capital case. [Citations.] We then balance the potential for prejudice to the defendant from a joint trial against the countervailing benefits to the state." (*Ibid*.)

The three factors listed above do not establish a risk of any spillover effect here. First, the charges were not unusually likely to inflame the jury against Mendez. "[T]he animating concern underlying this factor is not merely whether evidence from one offense is repulsive," but rather "'whether "'strong evidence of a lesser but inflammatory crime might be used to bolster a weak prosecution case' on another crime."'" (*Simon, supra,* 1 Cal.5th at p. 124.) Here, the offenses were "similar in nature and equally egregious—hence neither, when compared to the other, was likely to unduly inflame a jury against defendant." (*Soper, supra,* 45 Cal.4th at p. 780; see *People v. Mason* (1991) 52 Cal.3d 909, 934 [consolidation not inappropriate "simply because the defendant is

alleged to have acted brutally in each"].) Further, as the trial court noted, the injuries in question, while considerable, were not so horrendous they were particularly likely to inflame the jury.

Second, even if there was conflicting evidence from B.P.'s preliminary hearing testimony demonstrating weakness in some counts, none of the charges were weak enough to raise concerns the jury would "aggregate evidence and convict on weak charges that might not merit conviction in separate trials." (See *Simon, supra*, 1 Cal.5th at p. 127.) "[A]s between any two charges, it always is possible to point to individual aspects of one case and argue that one is stronger than the other. A mere imbalance in the evidence, however, will not indicate a risk of prejudicial 'spillover effect,' militating against the benefits of joinder and warranting severance of properly joined charges. [Citation.] Furthermore, the benefits of joinder are not outweighed—and severance is not required—merely because properly joined charges might make it more difficult for a defendant to avoid conviction compared with his or her chances were the charges to be separately tried." (*Soper, supra*, 45 Cal.4th at p. 781.) Here, notwithstanding any disparity in the strength of the various counts, the evidence showed Mendez had committed abusive acts against B.P. during each incident. There was thus little danger of prejudicial spillover from one incident to the next.

Third, none of the charges put Mendez at risk of capital punishment, so this third factor does not "militate[] against the benefits of joinder in the present proceedings." (*Soper, supra*, 45 Cal.4th at p. 780.)

Fourth, the potential for prejudice to Mendez from joinder did not outweigh the many countervailing benefits to the state. The law favors joinder of charges because it "avoids the increased expenditures of funds and judicial resources that may result from separate trials." (*Simon, supra*, 1 Cal.5th at p. 122.) Joinder "'prevents repetition of evidence and saves time and expense to the state as well as to the defendant.'" (*Armstrong, supra*, 1 Cal.5th at p. 455.) Trying the charges together promoted

"important systemic economies" and "case-specific efficiencies." (See *Soper, supra,* 45 Cal.4th at p. 781-782.)

By comparison, because the evidence on each incident was cross-admissible, severing the counts would have resulted in three identical trials, which would have increased the burden on the court system and resulted in inefficiency. "[E]ach of the numerous procedural steps attendant to any criminal proceeding—such as discovery, pretrial motions, as well as trial sessions themselves—would proceed on discrete tracks. Additionally, when [three] previously joined matters advance to separate trials, approximately [three times] as many prospective jurors would need to be summoned and subjected to the selection process." (*Soper, supra,* 45 Cal.4th at p. 782.) Holding three separate trials also could lead to three separate appeals. (*Ibid.*) The benefits of joinder thus easily outweighed any modicum of potential prejudice from joinder. For these reasons, the trial court's denial of Mendez's severance motion did not fall outside the bounds of reason. (*Id.* at p. 774.)

3. The Joinder of Charges Did Not Violate Mendez's Right to Due Process

Finally, Mendez's due process argument falls flat. On a due process challenge to a joinder of counts, the defendant shoulders a "high burden of establishing that the trial was grossly unfair and that he was denied due process of law." (*Soper*, 45 Cal.4th at p. 783.) In *Soper*, the California Supreme Court found no due process violation where the evidence on each crime was "'"simple and distinct"'" and "independently ample to support" each conviction. (*Id.* at p. 784.) That was also the case here.

Mendez notes the trial court dismissed four of the eight charged counts at the close of evidence, but that does not establish any gross unfairness in the court's refusal to sever the charges by dates. By dismissing four of the counts, the court eliminated any possibility the jury would convict Mendez of the most serious charges, such as assault with force likely to produce great bodily injury and assault with a deadly

weapon, based on evidence he committed the other properly joined crimes. Further, dismissing four counts did not remove any of the three incidents as a whole from the jury's consideration; it only eliminated certain charges attendant to those three incidents. Thus, there is no likelihood the presentation of evidence on each of those three incidents unduly prejudiced Mendez.

Accordingly, the proceedings were not grossly unfair and did not violate Mendez's due process rights. We therefore conclude the trial court did not err in declining to sever the charges against Mendez by date.

B. *The Admission of Propensity Evidence*

Mendez next claims the trial court erroneously admitted evidence of other uncharged acts of domestic violence against B.P.[3] We disagree.

As a general rule, the prosecution cannot use evidence of specific instances of a defendant's conduct to prove his or her conduct a specific occasion. (Evid. Code, § 1101, subd. (a); *People v. Falsetta* (1999) 21 Cal.4th 903, 911.) Evidence Code section 1109 (section 1109), however, creates a limited exception for propensity evidence in domestic violence cases. Section 1109 provides in pertinent part: "[I]n a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352." (§ 1109, subd. (a)(1).) "Section 1109 thus supplants the usual rule of evidence that evidence of past conduct is not admissible to prove a defendant's conduct on a specified occasion." (*People v. Hoover* (2000) 77 Cal.App.4th 1020, 1026.) "We review a challenge to a trial

[3] Specifically, B.P. described the early March 2015 argument that resulted in a cut lip and bruises to her chest, and she identified pictures of her with red marks and other injuries caused by Mendez. B.P. also described a 2016 incident in which B.P. became angry about Mendez cheating on her and slapped him, and Mendez became angry, pushed her onto the bed, and climbed on top of her.

court's decision to admit such evidence for abuse of discretion." (*People v. Johnson* (2010) 185 Cal.App.4th 520, 531.)

As noted above, Evidence Code section 1109 specifically incorporates Evidence Code section 352 (section 352), which provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." "'"The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues.'"'" (*People v. Rucker* (2005) 126 Cal.App.4th 1107, 1119.) "Relevant factors in determining prejudice include whether the prior acts of domestic violence were more inflammatory than the charged conduct, the possibility the jury might confuse the prior acts with the charged acts, how recent were the prior acts, and whether the defendant had already been convicted and punished for the prior offense(s)." (*Ibid.*) This balancing test is "entrusted to the sound discretion of the trial judge who is in the best position to evaluate the evidence." (*People v. Fitch* (1997) 55 Cal.App.4th 172, 183.)

When the trial court decided to admit the propensity evidence over Mendez's objection, it observed evidence of other acts of domestic violence was "admissible from the gate to show . . . propensity" under section 1108, and it found no danger of undue prejudice under section 352. It observed the early March 2015 incident was not more serious or egregious — and was arguably "less severe" — than the charged crimes. It also reasoned the evidence did not "necessitate an undue consumption of time because it's the same victim talking about what goes on between her and him." Finally, the court noted "it's not misleading the jury. It's not confusing the jury. All it is going to be [is] five minutes worth of testimony that, yeah, he did this to me before when there was a fight over money."

We see no abuse of discretion in the trial court's analysis. This is "a criminal action in which the defendant is accused of an offense involving domestic violence," so the propensity evidence in question met the threshold for admissibility. (§ 1109, subd. (a)(1).) The only remaining question is whether the court abused its discretion in determining the evidence's probative value was not substantially outweighed by any risk of undue prejudice. The court did not abuse its discretion.

First, the evidence was highly probative. In enacting section 1109, "the Legislature concluded that, in domestic violence cases in particular, a history or pattern of domestic violence is very probative." (*People v. Kerley* (2018) 23 Cal.App.5th 513, 535.) """"The propensity inference is particularly appropriate in the area of domestic violence because on-going violence and abuse is the norm in domestic violence cases. Not only is there a great likelihood that any one battering episode is part of a larger scheme of dominance and control, that scheme usually escalates in frequency and severity." (*Ibid.*) Thus, "[e]vidence that [a defendant] abused [his victim] multiple times is more probative than evidence that he did so once or twice; it is the frequency, regularity, and severity with which [Mendez] beat [B.P.] that infuses this propensity evidence with probative strength." (See *id*. at p. 536.) The evidence in question was therefore highly probative, particularly because it involved physical violence similar to the acts charged and was not remote in time from the charged offenses.

The evidence also did not create a substantial danger of undue prejudice. As the trial court noted, the propensity evidence was no more inflammatory than the charged incidents. Moreover, the presentation of the evidence took minimal court time (just minutes out of a 10-day trial), and there is no indication it confused or mislead the jury. To the contrary, the court gave a limiting instruction, CALCRIM No. 852, to curb any potential inflammatory effect of the propensity evidence, and the jury is presumed to have followed this instruction. (*People v. Delgado* (1993) 5 Cal.4th 312, 331.) Finally, in her closing argument, the prosecutor reminded the jury the early March 2015 episode

was uncharged, and the verdict forms expressly included the dates of the charged incidents. Viewing the record as a whole, there was no substantial danger the uncharged incidents confused or misled the jury. We therefore conclude the court did not err in admitting the propensity evidence.

C. *No Cumulative Error*

Having rejected Mendez's arguments against the joinder of charges and the admission of propensity evidence, we need not address his final argument of cumulative error. Simply put, "[b]ecause we have found no error, there is no cumulative prejudice to evaluate." (*People v. Lopez* (2018) 5 Cal.5th 339, 371.)

III.

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.